pletion, the contract is inseparable. *Appleby* v. *Myers* (1867) L. R. 2 C. P. 651. This is but to confound the two actions and to regard a quasi-contract as based on the intention of the parties, a conception which is fundamentally wrong. Keener, Quasi-Contracts, 1–25. A recent New Hampshire case seems to have miscarried along these lines, the court holding that a contractor who had undertaken to install a heating plant in a house, could not recover in a quasi-contract action when the building was destroyed before the job was completed. *Dame* v. *Woods* (1905) 60 Atl. 744.

The courts in this country have, however, generally reached a conclusion polar to that of the above case, but by reasoning which shows analogous confusion. A recovery seems to be allowed upon the theory that there is an implied promissory condition on the part of the owner to keep the building in existence. *Niblo* v. *Binsse* (1864) 3 Abb. App. Dec. 375; *Haynes* v. *Baptist Church* (1882) 12 Mo. App. 536; *Whelan* v. *Ansonia Clock Co.* (1884) 97 N. Y. 293. If that be true, obviously the action should be brought in *special assumpsit* with, consequently, a different measure of damages. Keener, Quasi-Contracts, 256. The learned author last cited would refuse a recovery in such cases because the owner has had no actual benefit. But this, in its turn, seems based on a misconception and a use of the term more in its vulgar than legal sense. Though every benefit in the popular meaning may be a quasi-contractual one, the converse is not necessarily true. If A steal a thousand dollars from B and burn them, he has had no substantial benefit, still no existing court would refuse a recovery. And yet this is a far weaker case than where title has been intentionally transferred. The benefit is measured by the value of the *res*, not by the use the owner may make of it. Now a pillar put into a house, a dash of paint on the wall become *ipso facto* part of the house. Title passes immediately giving dominion to the owner and it is within his discretion to exercise that dominion or not. The fact that the house was destroyed by the act of God or of a third party can not change the situation. The *res* had become part of the freehold by annexation and belonged to the owner of the soil. *Hayes* v. *Gross* (1896) 9 App. Div. 13. Aff. (1900) 162 N. Y., 610.

Immunity from Compulsory Physical Examination.—In both civil trials and criminal prosecutions, courts have been guided by two principles, first, that the truth of the matter in issue must be found out, but, second, that the legal contest of proving the truth must be according to fixed rules, binding on the contestants. See 5 Col. Law Rev. 467. From the first follows the duty to give testimony. 3 Wig. Ev., §§ 2190, 2192–4. From the second have arisen the special provisions in favor of the individual, e. g. the presumption of innocence rule, the privilege against self-incrimination, and exemption from testifying as to certain privileged communications. A recent case in Montana reviews the authorities on the question whether in an action for personal injuries, the court can, on motion of the defendant and in order that he may better prepare his defense, compel the plaintiff to submit to physical examination. *May* v. *Northern*

Pacific Ry. Co. (Mont. 1905) 81 Pac. 328. Such power, in the absence of legislation, is denied by some jurisdictions. *U. P. R. R. Co.* v. *Botsford* (1891) 141 U. S. 250. Others hold that it is inherent in all common law courts. *Schroeder* v. *Ry. Co.* (1877) 47 Iowa 375. In a third class, courts are given such power expressly by statute. Laws N. Y. (1893) c. 721; Code Civ. Pro. § 873; Stat. 31–32 Vict. (1868) c. 119 s. 26. See cases cited in principal case.

There is no authority that, in a civil action for personal injuries, the early common law gave such a writ. *Walsh* v. *Sayre* (1868) 52 How. Prac. 334 is the first reported assertion of such inherent power, the arguments in favor of its existence being solely by analogy. The right to discovery in equity and the power of compelling physical examination in cases of divorce for alleged impotency are not analogous, because of the fundamental difference between civil and ecclesiastical law and common law. By ancient rule of the common law, no man was bound to furnish his adversary with evidence to be used against himself. *Anon* (1702) 3 Salk. 363; 3 Bl. Com. (1768) 382; *Smith* v. *Morrow* (Ky. 1828) 7 T. B. M. 234. Statutes were therefore necessary to compel the production of written evidence without resorting to equity for a bill of discovery. 3 Wig. Ev. § 2219; Stat. 14–15 Vict. (1851) c. 99 s. 6; U. S. Rev. St. § 724; Laws 1789 c. 20 s. 15; N. Y. Rev. St. (1836) v. 2 p. 199 §§ 21, 22. There is authority, however, that the court, by virtue of its common law power, could compel production of a document where the case was grounded on it and where the person holding it might be considered to hold it in a fiduciary character. *Blakey* v. *Porter* (1808) 1 Taunt. 386; *Doe d.* v. *Slight* (1832) 1 Dowl. 163; *Willis* v. *Bailey* (N. Y. 1822) 19 Johns. 268. But as the right to personal integrity and freedom from physical interference has always been held most sacred, 3 Bl. Com. 120, even the compulsory production of documents would not seem to argue a power to compel physical examination. In case of an attempt to avoid a judgment or reverse a fine on the ground of nonage, the court could determine this question by inspection. 2 Roll. Abr. 572, 573; 9 Bac. Abr. (Am. Ed.) 553 "Trial." So in the case of determining the identity of a party before the court. (1454) 34 H. 6 45; 2 Roll. Abr. 578. But in neither of these cases does it appear that the inspection involved more than a scrutiny of the features. In an action of trespass for mayhem, or for atrocious battery, a common law court might after verdict for the plaintiff, and on *his own motion, super visum vulneris*, increase the jury's damages at its discretion. *Cook* v. *Beal* (1696) 1 Ld. Ray. 176; *Brown* v. *Seymour* (1742) 1 Wils. 5. Compulsory examination was not there involved.

It was, however, known to the early common law. On an appeal of mayhem, the court could adjudge the issue of mayhem or no mayhem by inspection, at the prayer of the defendant. 2 Roll. Abr., 578; 9 Bac. Abr. (Am. Ed.), 554, "Trial." Where a woman, convicted of a capital crime, was alleged to be quick with child, the writ *de ventre inspiciendo* was allowed in order to prevent taking the life of an unborn child. 1 Hale P. C., 368; 2 Id. 413; *Regina* v. *Wycherley* (1838). 8 C. & P., 262. Where a widow was suspected of feigning herself with child in order to produce a supposititious heir, the heir presumptive might have a similar writ to examine whether she

was with child or not. Bract. l. 2, c. 32; Co. Litt. 8 b. Thus the writ was granted to save innocent life, and where the party withholding the best evidence was at the same time attempting to convict the defendant of felony. Its only use in a civil case was to protect the rightful succession to property, thus affecting not merely the parties to the suit, but frustrating "an attempt which the rigor of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death." 1 Bl. Com. 456. In view, therefore, of the common law theory that no man is bound to furnish his adversary with evidence, strengthened here by the sanctity of the right of personal freedom, the principal case seems correct in refusing to extend the right to compulsory physical examination beyond the few cases, extraordinary in their circumstances, in which it was allowed in early common law. The need for such examination is often urgent, where, for example, the defendant's only argument is to discredit the plaintiff's witnesses, but it would seem to be for the legislature and not the courts to remedy this lack of power.

ABANDONMENT OF FELONIOUS DESIGN AS AFFECTING PREMEDITATION IN MURDER.—Murder in the first degree under the clause in most penal codes defining it as a "wilful, deliberate, and premeditated killing," consists of two distinct elements, both of which must concur: (1) an act amounting to murder at common law, and (2) the additional element of deliberation and premeditation. Despite attempted distinctions, these latter terms seem practically synonymous. They mean that the defendant, while in a cool and rational state of mind, considered whether or not he should kill the deceased, and decided definitely to kill him. McClain, Crim. Law, § 358; *People* v. *Hawkins* (1888), 109 N. Y. 408; *People* v. *Barberi* (1896), 149 N. Y. 256; *Keenan* v. *Commonwealth* (1862), 44 Pa. St. 55. The deliberation and premeditation must occur before the act and continue thereto. This principle is well illustrated in those cases holding that where A assaults B with intent to murder, but during the conflict withdraws and in good faith gives up his original design, he is again remitted to his right of self-defense, and if forced to kill B to protect himself, will not be guilty of murder. Hale, P. C. 482; *Stoffen* v. *State* (1864), 15 Ohio St. 47; *Parker* v. *State* (1889), 88 Ala. 4; *People* v. *Button* (1895) 106 Cal. 628; *State* v. *Shockley* (1905) 80 Pac. 865.

In view of these well settled rules a recent decision in California is worthy of notice. The defendant was a member of an armed gang that went to rob a safe. Finding the premises guarded they abandoned this plan and started back, encountering some time later an officer who apparently undertook to arrest and search them. A melee ensued in which the officer was shot and killed. On appeal, the Supreme Court affirmed a conviction of murder in the first degree, holding that the evidence of preparations to kill made in connection with the projected burglary was sufficient proof of deliberate purpose. *State* v. *Woods* (1905) 81 Pac. 652. It would seem that the court might well have found sufficient evidence of deliberation and premeditation to commit murder upon the appearance of the officer and during the melee. *State* v. *Brown* (1889) 41 Minn. 319; *State* v.